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Supreme Court, U.S.
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No. 03-332

IN THE

Supreme Court of the United States

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, *et al.*,
Petitioners,

v.

COTTER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Cotter Corporation, Defendant and Appellant below, is a New Mexico corporation which is headquartered in Colorado and wholly owned by General Atomics, a privately held California corporation. No publicly traded company owns ten percent or more of the outstanding stock of General Atomics.

Exelon Corporation, a publicly traded corporation, owns Commonwealth Edison, which formerly owned Cotter Corporation. Exelon Corporation retains a financial interest in Cotter Corporation and in this litigation under the terms of Commonwealth Edison's 2000 sale of Cotter Corporation to General Atomics.

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

ARGUMENT

Pursuant to Supreme Court Rule 15.8, Respondent Cotter Corporation files this Supplemental Brief to call this Court's attention to the Tenth Circuit's decision in *Goebel v. Denver & Rio Grande Western Railroad Company*, No. 02-1391, 2003 WL 22311330 (10th Cir. Oct. 9, 2003) ("*Goebel II*"), which issued three days after Cotter filed Respondent's Brief in Opposition. *Goebel II* also applies the standard used by the Tenth Circuit in this case concerning appellate review of a district court ruling pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Goebel II* demonstrates beyond peradventure the strict propriety of the Tenth Circuit's *Daubert* standard.

In *Goebel v. Denver & Rio Grande Western Railroad Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) ("*Goebel I*"), the Tenth Circuit had reversed a judgment for plaintiff entered after a jury trial because the district court had failed to exercise the gatekeeper function. On remand, the district court denied defendant's motion for an evidentiary hearing on the *Daubert* issues, but "took pains to 'demonstrate by specific findings on the record that it ha[d] performed its duty as gatekeeper.'" *Goebel II*, 2003 WL 22311330, at *2 (quoting *Goebel I*, 215 F.3d at 1088). The district court concluded that plaintiff's expert's testimony was admissible, and the parties stipulated to a judgment in the amount of the first trial so that defendant could appeal that ruling promptly.

What makes *Goebel II* so instructive is the fact that "[n]either party argue[d] that the district court ha[d] again failed to perform its gatekeeper function." *Goebel II*, 2003 WL 22311330, at *2. What remains, then, is the Tenth Circuit's review of the district court's resolution of the question of reliability – precisely the ultimate focus of the Tenth Circuit's decision below in this case.

Plaintiffs argue that the Tenth Circuit's de novo review of *what* legal standard is applied somehow taints the Tenth Circuit's review of *how* the district court applied that standard -- as plaintiffs' supporting amici put it, "the Tenth Circuit opinion in *Dodge* applies a 'de novo' standard to not just *whether* the district court performed the gatekeeper function, but *how* it did so." Amicus Br. at 3 (emphasis in original). In *Goebel II*, only the "*how* it did so" is at issue, thus revealing clearly the Tenth Circuit's standard for reviewing that question.

In *Goebel II* the Tenth Circuit states time and again – with cites to its opinion in this case, *Dodge v. Cotter Corp.*,

328 F.3d 1212 (10th Cir. 2003), each time – that it defers to the district court's broad discretion. First, the *Goebel II* opinion states:

> The trial court's broad discretion applies both in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Dodge*, 328 F.3d at 1223.

2003 WL 22311330, at *1. Then *Goebel II* continues:

> Accordingly, we will not disturb the district court's ruling unless it is "arbitrary, capricious, whimsical or manifestly unreasonable" or when we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Dodge*, 328 F.3d at 1223 (internal citation omitted).

Id. Finally, *Goebel II* reiterates:

> As we stated above, our review is deferential – only if we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances" will we disturb its ruling. *Dodge*, 328 F.3d at 1223 (internal citation omitted). Despite our expertise on the law, our role as judges is not to second-guess well qualified and highly trained medical experts

> on difficult judgment calls within their field of expertise; our role is merely to ensure that the district court did not abuse its discretion by concluding that the expert testimony in this case was admissible under the standards outlined above.

Id. at *5. That the Tenth Circuit adheres rigorously to *Daubert* cannot be gainsaid.

In the end, *Goebel II* affirms the district court's *Daubert* conclusion. The reason *Goebel II* reaches a conclusion different from that below is made clear by comparing the Tenth Circuit's two detailed decisions. *Goebel II* reveals how the district court in that case addressed the issue of reliability and made detailed findings on that issue. *See Goebel II*, 2003 WL 22311330, at *6-*10. In contrast, *Dodge* reveals how the district court in this case focused only on the experts' qualifications and abandoned the issue of reliability in its entirety to the jury. Pet. App. 23a-31a.

Goebel II undermines another argument for certiorari, raised primarily by plaintiffs' supporting amici. Amici contend that the Tenth Circuit's standard "will significantly increase the strain on judicial resources, requiring, as it seems, some sort of mandatory trial before trial" thus "mak[ing] prosecuting cases prohibitively expensive." Amicus Br. at 7. The Tenth Circuit's *Dodge* opinion, of course, indicates that evidentiary hearings will not become necessary in every case. Pet. App. 29a. *Goebel II* proves that point; it involves the denial of a request for such a hearing by the district court, a ruling so obviously correct that defendant did not even challenge it on appeal. This "floodgates" argument holds no water.

CONCLUSION

As *Goebel II* highlights, the Tenth Circuit's application of *Daubert* is in accordance with the teachings of this Court and creates no conflict among the circuits. For the reasons set forth above and in Respondent's Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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